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In the Supreme Court of the United States

OCTOBER TERM, 1987

PHILLIPS PETROLEUM COMPANY,
Petitioner,

vs.

IRL SHUTTS and ROBERT ANDERSON and BETTY ANDERSON, individually and as representatives of all royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds of royalties pursuant to Federal Power Commission Opinion Nos. 699, 749 and 770,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI AND ANSWER TO PETITION FOR WRIT OF MANDAMUS

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QUESTIONS PRESENTED

1. Did the Kansas courts thoroughly review the statutes and case law of other interested states pertaining to interest on FERC suspended royalties and find they would have decided this case just as did Kansas?

2. Did the specific application by Kansas of FERC interest rate, which is essentially the bank prime rate, violate any of Phillips' constitutional rights?

3. Is there now or has there ever been any "federal common law" issue in this case?

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI AND ANSWER TO PETITION FOR WRIT OF MANDAMUS

Petitioner will be referred to as "Phillips." Plaintiff class consists of all of to whom Phillips pays gas royalties, excepting those who have "opted out" and a few who signed indemnity agreements and were paid currently. They will be referred to as "gas royalty owners," "landowners," "royalty owners" or "respondents."

The opinions below are as set forth in Phillips' Appendix to Petition.

NATURE OF THE CASE

This is an action in equity, a class consisting of Phillips' gas royalty owners against Phillips to collect interest or damages for the use by Phillips of the royalty owners' money, ordinarily paid out to the royalty owners monthly. Phillips instead notified its royalty owners that it was suspending certain increased royalties pending approval by the courts of gas rate increases allowed by FERC. Phillips did not suspend the increased royalties by placing them in a suspense account which would draw interest, but, instead, placed them in their general cash account, just as other income from royalty owners' leases, and used them to make a profit for Phillips and its shareholders.

This is a reversal and remand by the U. S. Supreme Court to re-examine the interest laws of other states where Phillips has the oil and gas leases giving rise to the royalties "suspended" and used by Phillips. The exact same set of facts, except for numbers and territory involved, was before the Kansas Supreme Court twice before. (*Shutts I* and *Shutts II.*)[1]

STATEMENT OF THE CASE

On remand from the U. S. Supreme Court, the Kansas Supreme Court first sent the case back to the trial court for re-examination in the light of the U. S. Supreme Court opinion. The Trial Court re-examined interest laws of

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1. *Shutts, Executor v. Phillips Petroleum Company,* 222 Kan. 527, 567 P.2d 1292 (1977), cert. denied, 434 U.S. 1068 (1978); and *Shutts v. Phillips Petroleum Company,* 235 Kan. 195, 679 P.2d 1159 (1984).

other states and came to the same conclusion as before regarding interest allowable in those states and the interest rate.

The Kansas Supreme Court affirmed the Trial Court again, saying, "this is the third time this case has been before us." True. The first case was *Shutts, Executor v. Phillips,* involving the Hugoton-Anadarko area, and 6,400 of Phillips' royalty owners of whom only 264 resided in Kansas. In *Shutts, Executor,* FPC Opinion 586, an area consisting of all of the State of Kansas and parts of the States of Texas and Oklahoma were involved. This was one of seven pricing areas of the FPC at the time. Later, with Opinion 699, involved in this case, the FERC (formerly FPC) abandoned area-wide pricing and began nation-wide pricing because natural gas was bought, distributed and sold nation-wide, not just area-wide. Pricing being nation-wide, the class affected by Phillips' actions became nation-wide rather than area-wide.

Kansas in a number of cases and all other states that have examined the question of equity in requiring gas producers to pay interest on their royalty owners' money held and used rather than being paid out, have required the gas producers to pay interest to their royalty owners.[2]

Phillips raises no defense to the general and universal proposition in equity that where one makes use of another's money to make a profit for himself, he must pay for its use.

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2. *Shutts, Executor v. Phillips Petroleum Company,* 222 Kan. 527; *Shutts v. Phillips Petroleum Company,* 235 Kan. 195; *Phillips Petroleum Company v. Stahl Petroleum Company,* 569 S.W.2d 480; *Boutte v. Chevron Oil Company,* 316 F. Supp. 524.

Rather, Phillips fabricates defenses based on technicalities of laws of other states and alleged constitutional infirmities of the actions of the Kansas courts, as will be discussed more later in this brief.

Plaintiff class consists of the landowners, those who originally owned the oil, gas and other minerals in and under the land, and also certain assignees of interest in the oil, gas and minerals. They have leased either directly to Phillips Petroleum Company or to oil and gas brokers who have assigned to other producers or to Phillips, and Phillips, under the terms of the oil and gas leases, customarily pays out 1/8th of the proceeds of sale of gas produced to those royalty owners monthly. Phillips and in some cases other gas producers receive the 7/8ths of the proceeds of production.

In order to obtain a price increase for gas sold by Phillips to gas purchasers, certain rate schedules had to be filed with the FERC, setting forth the increase, and in Opinions 699, 749 and 770, FERC did approve certain rate increases. Phillips collected the rate increases. Phillips now calls the 1/8th of the increases as to royalty owners "additional royalties." This they are, but heretofore they have been called "suspense" royalties by Phillips. This is a misnomer because the royalty money itself never was suspended. It was put in Phillips' cash account and used by Phillips to make a profit.

Phillips exaggerates: it convinced this Court that the difference between the Texas 6% statutory rate and the FERC rate of 9% (up until October 1, 1979) would amount to "millions of dollars." (Appendix, U. S. Supreme Court Opinion, Page 80a.) Attached is copy of letter from T. L. Cubbage, head of Phillips Legal Depart-

ment, pertaining to total interest due at FERC rates until the end of 1987. Total interest due under all rate schedules when this case was filed in August, 1979, was only about $1 million. The increase to $2.4 million is accounted for by Phillips' continuing to contest the payment of interest, even after it had paid interest under almost identical facts and circumstances in *Shutts I*. Payment of $1.00 interest to its royalty owners in 1979 would have prevented the payment now of approximately $2.50. Payment of $300,000.00 to royalty owners at the time this suit was filed - not "millions of dollars" - would have satisfied the difference. The Texas statutory rate is discussed later in this argument.

The following are the essential facts as quoted from the Kansas Supreme Court Opinion, Appendix to Petition, Page 116a.

> "This is a class action suit brought against Phillips . . . by Irl Shutts, Robert Anderson and Betty Anderson, individually and on behalf of 28,100 royalty owners, including those who are not residents of Kansas, for recovery of interest on 'suspense royalties' on gas produced from leases in 11 states. These royalties were withheld by Phillips at various times from July, 1974 to February, 1978, under three Federal Power Commission (FERC) Opinions pertaining to gas rates in *nation-wide gas rate proceedings* (emphasis supplied), and later paid by Phillips to the royalty owners without interest. The Trial Court determined (1) the class consisted of all royalty owners and overriding royalty owners who received suspense royalties from Phillips, whether or not they were residents of Kansas (2) Phillips was liable for for interest on all royalties and overriding royalties

retained by it under the FPC Opinions, and (3) the applicable rate of interest owed on the suspense royalty payments (seven percent (7%) per annum until October 10, 1974, nine percent (9%) per annum thereafter until September 30, 1979, and thereafter at the average prime rate, compounded quarterly, as provided by 18 C.F.R. 154.67)."

SUMMARY OF ARGUMENT

1. Phillips' Petitions are not justified and are not legally responsible.

2. Phillips raises for the first time an issue it calls "federal common law." This issue has not been raised before. It should not be raised now. The decisions of the Kansas Trial Court and of the Kansas Supreme Court have nothing to do with federal common law. They apply the same interest rate, the bank prime rate, the FERC rate, to this same money refunded to its royalty owners that Phillips would have had to pay to its gas purchasers if the money had been refunded to them. It is an equitable rate. It is a proper rate. It is not an attempt to extend federal regulation, but simply using a rate that Phillips would have had to pay if it had borrowed the money rather than using the royalty owners' money.

3. Forum shopping is not an issue. There has been no forum shopping in Kansas in the 10 years since the *Shutts I* Kansas decision.

4. The decision of the trial judge, Honorable Keaton G. Duckworth is fair and impartial. He reviewed cases and statutes in other states cited by Phillips. He came to the same conclusion as before, Phillips would have been

liable had all of the facts and circumstances of this case been presented to the Supreme Courts of the other states involved, and at the bank prime rate, the FERC rate.

5. The Kansas Supreme Court decision was fair and impartial. It indicated a thorough review of cases and statutes of other states pertaining to interest as a matter of equity. It found that the antique 6% statutory interest laws were not applicable here, but that Phillips should pay interest the same as banks would have charged their good customers, the prime rate, the FERC rate.

6. National gas pricing is not an issue in this case.

7. The decisions of the Kansas Courts are not arbitrary or unfair as far as Phillips is concerned, are responsive to the opinion of this Court and violate no constitutional principles.

ARGUMENT

I. Phillips' Petitions Not Justified

Phillips' Petition for Mandamus and Certiorari is based on fabrication. Its accusations against the Kansas Supreme Court are in error, not responsible, and, at best, undignified:

1. "The Kansas courts' repeated reliance on . . . 'equitable considerations' . . . only reflect their own *parochial interest.*" (Phillips' Petition, Page 14.)

2. "The Kansas Supreme Court seems *pathologically determined* to maximize Phillips' liability . . ." (Petition, Page 14.)

3. "Its latest technique is simply to 'FERC'em'." (Petition, Page 14.)

The Kansas court has been well respected for many years and still stands high among the Supreme Courts of the various states. Its opinions are fair and impartial. In this case, it affirmed judgment for interest equitably due Phillips' own royalty owners for money used for the benefit of Phillips and its shareholders. The Supreme Court of Kansas does not deserve treatment such as the above at the hands of Phillips.

Phillips further demonstrates its bad faith in its argument by such allegations as:

> "The (Kansas) court's lack of good faith also can be seen by the bald fabrication of 'industry practice' to defeat the effect of a controlling Oklahoma statute." (Petition, Page 17.)

The term "industry practice" was taken from an Oklahoma case. The Kansas court did not make bald fabrications about the statute, but did cite Oklahoma cases to show the statute was not applicable in this case.

In Texas, *Phillips Petroleum Co. v. Stahl*, equity principles were applied but the statutory 6% rate rather than the 7% FPC rate at the time was applied. The most equitable interest rate obviously is not the statutory rate. The FERC rate has been held many times to be an equitable interest rate to prevent unjust enrichment.[3]

The Kansas court applied the FPC rate in seven similar class action cases in Kansas, and it was paid by the gas

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3. *United Gas Improvement Co. v. Callery Properties*, 382 U.S. 223, 15 L.Ed. 284, 86 S. Ct. 360, Syl. 9; *Texaco, Inc. v. Federal Power Commission*, 290 F.2d 149 (1961); *Mississippi River Fuel Corp. v. FPC*, 281 F.2d 919 (1960); *Brooklyn Union Gas Co. v. Transcontinental Gas P. L. Corp.*, 201 F. Supp. 679 (1960); *Continental Oil Co. v. FPC*, 378 F.2d 510; *In Re Permian Basin Area Rate Cases*, 88 S. Ct. 1344 (1968); *Skelly Oil Co. v. FPC*, 401 F.2d 726 (1968).

producers.[4] The Louisiana court in *Boutte v. Chevron,* 316 F. Supp. 524, said that FERC interest would be payable on the suspense royalties by Chevron when paid.

Wortman was a case quite similar to this one. Phillips did not opt out, but elected to stay in the case. (See letter from T. L. Cubbage, general counsel for Phillips, dated March 31, 1983, and hereto attached.)

In Texas, in *Sid Richardson Carbon & Gas Co. v. Phillips Pet. Co.,* 456 F.2d 203 (1972), Phillips was ordered to pay interest on suspense royalties at FERC rates. The court further said:

> "Phillips contends that the Texas law prohibits the award of interest on interest. . . We think Phillips misses the mark on this argument. . . The sum found due is technically interest. In substance, however, it is a part of the sum necessary under the holding of the District Court to place Richardson in parity with El Paso under the contract. Once that sum was determined, *it became a part of the whole.* Interest was due on so much of the whole as remained unpaid after January 31, 1969." (Emphasis supplied.)

Phillips' royalty owners had a legal and equitable right to expect Phillips to pay for the use of their money.

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4. *Nix v. Northern Natural Gas Producing Co.*, 222 Kan. 739, 567 P.2d 1322 (1977), cert. denied, 434 U.S. 1067 (1978); *Sterling v. Superior Oil Co.*, 222 Kan. 737, 567 P.2d 1325 (1977), cert. denied, 434 U.S. 1067 (1978); *Maddox v. Gulf Oil Corporation*, 222 Kan. 733, 567 P.2d 1326 (1977), cert. denied, 434 U.S. 1065 (1978); *Shutts, Executor v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292 (1977), cert. denied, 434 U.S. 1068 (1978); *Wortman v. Sun Oil Co.*, 236 Kan. 266, 690 P.2d 385 (1984), vacated, ... U.S. ....., 88 L.Ed.2d 33 (1985); *Helmley v. Ashland Oil, Inc.*, 1 Kan. App.2d 532, 571 P.2d 345 (1977); *Gray v. Amoco Production Co.*, 1 Kan. App.2d 388, 564 P.2d 579 (1977), modified, 223 Kan. 441 (1978).

Phillips should have expected to pay for the use of the money. Payments of suspense royalties without interest or mention of interest by Phillips was done deliberately, intentionally and knowingly in violation of its royalty owners' rights and interests. Certainly the rulings in this case were no surprise to Phillips and it would have been arbitrary and unfair to the royalty owners had they not been allowed interest as was done in *Shutts I* prior to the payouts in this case.

II. Federal Common Law Not an Issue

Phillips now contends that the Kansas courts treated the issues as though they were governed by a "wholly inapposite federal regulation, 18 C.F.R. Section 154.162." (Petition, Page 8.)

Not so. The Kansas court found that the royalty owners' share of the gas purchase money, 1/8th, was governed by federal regulation if it had to be refunded to the gas purchaser. The FERC interest rate had been determined by this and other cases to be an equitable rate, so what more equitable than to apply the same rate to refunds by Phillips to its own royalty owners?

Other state law did not differ from Kansas law. Kansas law and other state's law had a low statutory rate, when no other rate was applicable by contract or other law. The Kansas court found no federal common law surrounding the FERC interest regulation. It did find that the average bank prime rate, the best rates charged by banks to their good customers, which was the FERC rate, would be an equitable rate.

It is an admitted fact that royalty obligations of producers to their royalty owners are controlled not by

FERC but by the oil and gas leases and state law. Otherwise, this case would not be here. Phillips would have paid its royalty owners interest at FERC rates if the matter had been subject to FERC regulation. Phillips did in its request for indemnity from its royalty owners ask for refund of suspense royalties paid with interest at FERC rates, if refund were ordered.

III. Forum Shopping Not an Issue

Phillips is mistaken in its argument on "forum shopping". The seven cases referred to on Page 20 of its Petition all were filed by royalty owner clients of the firm of Chapin & Penny, who represent plaintiff class in this action, and of Hathaway & Kimball of Ulysses, Kansas, their co-counsel. All plaintiffs were Kansas residents. All cases were filed not after the *Shutts I* decision, but at about the same time as *Shutts I* was filed.

Wortman v. Sun Oil Co., 236 Kan. 266, 690 P.2d 385, was filed by a Kansas resident, a royalty owner client of Chapin & Penny at about the same time this case was filed. The helium case was filed in 1971. *Matzen v. Cities Service Oil Co.*, 233 Kan. 846, 667 P.2d 337, was a case concerned only with the market value of gas produced in Kansas.

There is no evidence that Kansas is a "magnet attracting class actions."

IV. Judge Duckworth's Opinion

The Kansas Supreme Court remanded this case to the trial judge for retrial in the light of the U. S. Supreme Court's reversal and mandate. The Honorable Keaton G. Duckworth lives in Elkhart, Kansas, in a part

of the Hugoton-Anadarko area adjoining Oklahoma and near Texas. He has had many years of experience on the bench and has heard many oil and gas cases. He is well respected throughout the State of Kansas for his decisions in oil and gas matters. He thoroughly re-examined cases and statutes in other states cited by Phillips and by plaintiff class. He said, among other things, the following:

> "Kansas . . . Texas . . . and Louisiana . . . are the only states to have been presented this issue directly, and all have reached the same conclusion as the Kansas Supreme Court." (Appendix, Memorandum Opinion, Page 55a.)

> "It may bear repeating that the issue to be decided in each state where the question arises is whether or not the defendant, as a producer, or with royalty obligations of a producer, may take advantage of the Federal Energy Regulatory Commission to withhold suspended royalties belonging to the royalty owners or to the buyers, and thus came the use of such money."

> "As the Texas Court noted in the *Stahl* case, quoting *Phillips Petroleum Co. v. Adams*, 513 F.2d 355, Phillips may say that the possession and utilization of funds to which it had no pretense of claim was reasonable, or even that the actions were necessary, but Phillips cannot be heard to say that is fair and equitable that it should enjoy such a financial advantage for so long, and pay not a cent for it." (Emphasis in original.) (Appendix, Page 55a.)

Judge Duckworth went on to review the case of *West Edmond Hunton Line Unit v. Young*, 325 P.2d 1047, which

allowed royalty owners prejudgment interest from date of sale of oil, and further said:

> "Thus, this Court concludes that if the issue were squarely presented to the Courts of Oklahoma, those courts would follow the rules announced in the Shutts cases."

Judge Duckworth cites the *Sid Richardson* case as further authority for the Texas Supreme Court to allow interest at FERC rates.

He further said:

> "The defendant, in the few instances in which indemnity agreements were obtained from royalty owners, and the increased rates were paid directly, required those royalty owners to agree to possible repayment at the FERC rate." (Appendix, Page 58a.)

Judge Duckworth quotes from interest laws of Texas, Oklahoma and Kansas, the statutes which call for 6% interest in the absence of any contract as to the rate of interest, and further says:

> "These are typical of those in all states involved in this action and all allow rates other than that specified by agreement of parties by contract or by other law. Thus, none are mandated to apply to the facts of this case."

He concluded:

> "I find no basis to conclude that any state court would be any less logical or fair than the Kansas Supreme Court has been in the *Shutts* case. And I find no legal basis for concluding that these states would produce results other than those reflected in the *Shutts* case." (Appendix, Page 59a.)

V. Kansas Supreme Court Decision

Phillips appealed from Judge Duckworth's decision and order. Briefs were filed by both parties. Oral argument was had before the entire court. The case was argued by the parties and decided in conference by the Kansas Supreme Court prior to the retirement of Chief Justice Schroeder. The decision of the Kansas Supreme Court was unanimous in favor of plaintiff class allowing interest on the money used by Phillips at an equitable rate which was found to be the FERC rate. Chief Justice Schroeder, who had written the opinions in *Shutts I* and *Shutts II* was assigned to write this opinion.

The Chief Justice writes opinions that are scholarly, thorough and decisive of the applicable law. He was District Judge of Harvey County, Kansas, an oil and gas county, before going to the Supreme Court a number of years ago.

The Supreme Court of Kansas is one of the better state courts, and they have dealt with oil and gas litigation many times.

Highlights from Chief Justice Schroeder's opinion this time are as follows:

> "This is the third time this class action case has come before the Supreme Court for review." (Appendix, Page 3a.)
>
> "(In *Shutts I*) . . . plaintiffs sought to recover interest on 'suspense royalties' attributable to gas produced from leases in the three state Hugoton-Anadarko area . . . during a nine year period from June, 1961 to October, 1970. . . The named plaintiff, a Kansas resident, was a representative of a class of 6,400 gas royalty owners, 218 of whom were Kansas residents.

> This court ruled it could exercise in personam jurisdiction over unnamed nonresident class plaintiffs where procedural due process was satisfied by notice, an opportunity to be heard, and adequate representation. Having found the class action was proper and binding on resident plaintiffs, this court also ruled that, *under the equitable principle of unjust enrichment,* Phillips was liable to the plaintiffs for interest on the suspended royalties in the amount set forth under Phillips' corporate undertaking with the Federal Power Commission (FPC), seven percent per annum, with an additional statutory post-judgment interest of eight percent per annum." (Emphasis supplied.)

The opinion goes on to show that *Shutts II* "was factually similar to *Shutts I.*" It further quoted from *Shutts II* as follows:

> "In *Shutts I* it was held the rate of interest set forth in the corporate undertaking established an appropriate measure of damages to compensate the plaintiffs for the unjust enrichment derived by Phillips from the use of the plaintiffs' money." (Appendix, Page 5a.)

The opinion then refers to the findings of his Court on jurisdiction over nonresident plaintiffs, the matter of whether or not there was a conflict in the laws of Kansas and the laws of other states involved and whether or not the conflicts alleged by Phillips actually existed. The opinion quotes from the U. S. Supreme Court opinion, 472 U.S. at 816-18 as follows:

> "These putative conflicts range from the direct to the tangential and may be addressed by the Supreme Court of Kansas on remand under the correct constitutional standard.
>
> . . .

"The conflicts on the applicable interest rates, alone - which we do not think can be labeled 'false conflicts' without a more thorough-going treatment than was awarded them by the Supreme Court of Kansas - certainly amounted to millions of dollars in liability." (Appendix, Pages 6a and 80a.)

"It is important to note the court stated the following:

"We make no effort to determine for ourselves which law must apply to the various transactions involved in this lawsuit, and we reaffirm our observation in *Allstate* that in many situations a state court may be free to apply one of several choices of law. But the constitutional limitations laid down in cases such as *Allstate* and *Home* . . . must be respected even in a nation-wide class action."

The decision then points out that Judge Duckworth's opinion "found no conflicts existed with the laws of Kansas on the two issues of liability and applicable interest rate" and the opinion goes on to say "we will review the laws of each of these states (Texas, Oklahoma, New Mexico, Wyoming, Louisiana and Kansas) as applicable to the two issues involved: (1) whether Phillips is liable to the royalty owners for interest on the suspense royalties and (2) if Phillips is liable, what is the applicable interest rate?

The opinion then reviews thoroughly and in detail the laws of each of the five principal states involved and the interest rate applicable.

The opinion concludes:

"Under equitable principles, the states would imply an agreement binding Phillips to pay the funds held

in suspense to the royalty owners when the FPC approved the respective rate increases sought by Phillips, together with interest at the rates and in accordance with the FPC regulations found in 18 C.F.R. Section 154.102 (1986) to the time of judgment herein. These funds held by Phillips as stakeholder originated in federal law and are thoroughly permeated with interest fixed by federal law in the FPC regulations as heretofore set forth in this opinion." (Appendix, Page 50a.)

Although having done considerable research into interest laws and rates of other states involved before,[5] the Kansas Courts now thoroughly have reviewed and considered the interest laws of Texas, Oklahoma, Louisiana, New Mexico and Wyoming, the cases and statutes cited by Phillips, and have come to the conclusions that there is no question about liability for interest as an equity matter and that the FERC rate is the proper rate in Kansas and other states.

The opinions should not call for wild speculations by Phillips about federal common law, nor should they call for Phillips to say in an almost vulgar manner that Kansas Courts are trying to "FERC'em".

VI. National Gas Pricing

Phillips complains about having to pay interest for the use of its royalty owners' money might have an adverse impact on interstate natural gas pricing. Records in this case show that Phillips' net profits for some of the years

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5. *Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292 (1977), cert. denied, 434 U.S. 1068 (1978), and cases there cited.

in question were in excess of $2 million per day. Paying out a little money for interest to its royalty owners should not affect price of natural gas Phillips charges to its gas purchasers and would affect net profits to Phillips and its shareholders only minimally.

VII. No Constitutional Principles Violated

The application of basic equitable principles of restitution to the facts of this case violated no constitutional proscription concerning choice of law. The measure of damages authorized by the Kansas Courts can hardly be said to be "arbitrary or fundamentally unfair" in any constitutional sense. (See *Allstate Ins. Co. v. Hague,* 449 U.S. 302.) It was based solely on Phillips' undertaking with the FPC and its indemnity offer to its own royalty owners. Despite Phillips' suggestion to the contrary, there is no real basis for this court to determine that this case, tried in the courts of one of the other states involved, would have led to a different result.

The Kansas Supreme Court has painstakingly reviewed the laws of the states involved and has determined that each of the states involved would require Phillips to pay interest on the money it withheld from royalty owners. The Kansas Court also reviewed the laws of the states involved and determined that each of the states would require that interest be paid at the same rates required of Phillips by FERC regulation. This rate is the same rate as *required by Phillips* in the indemnity agreements signed by some royalty owners.

The Kansas Court faithfully applied the laws of the several states involved to the unique facts of this case. There is no substantial federal question for decision by this Court.

Phillips contends that the Kansas Supreme Court ignored contrary Texas law as set out in *Phillips Petroleum Co. v. Stahl,* 569 S.W.2d 480 (Texas, 1978). In *Stahl* the plaintiff asked for and was awarded interest at the rate of 6% per annum. Phillips' liability for interest at a higher rate was not presented to the Texas Supreme Court, nor did the Texas Supreme Court rule on that point. The *Stahl* case is simply not authority for a *limit* of 6% interest. The issue of whether interest should be allowed at the 6% statutory rate *or* at FERC rates was not presented in the *Stahl* case and was not ruled on by the Texas Courts.

As to the statutory interest rate in *Stahl,* a decision is not a precedent unless the issue is argued and presented to the court. (Corpus Juris Secundum, *Courts,* Section 186.) In *United States v. L. A. Tucker Truck Lines,* 344 U.S. 33, 97 L.Ed. 54, 73 S. Ct. 67, it is said:

> "Even as to our own judicial power or jurisdiction, this court has followed the lead of Mr. Chief Justice Marshall who held that this Court is not bound by prior exercise of jurisdiction in a case where it was not questioned and it was passed sub silentio."

See also *United States v. More,* (U.S.) 3 Cranch 159, 2 L.Ed. 397. In 20 Am Jur 2d, *Courts,* Section 190, it is stated:

> "It is only a judicial decision on a point of law that is stare decisis, and it is not enough that the point was considered in the prior case; it must have been decided. Stated otherwise no opinion is an authority beyond the point actually decided. It follows that a case cannot be considered as a binding precedent on a legal point that was not argued in the case and not mentioned in the opinion."

See *United States v. Mitchell,* 271 U.S. 9, 70 L.Ed. 799, 46 S. Ct. 418, where it is said:

> "That question was not presented to the court for decision, and no such question was considered or decided. It is not to be thought that a question not raised by counsel or discussed in the opinion of the court has been decided merely because it existed in the record and might have been raised and considered."

See also, *Webster v. Fall,* 266 U.S. 507, 69 L.Ed. 411, 45 S. Ct. 148:

> "Counsel for appellant directs our attention to other cases, where this court proceeds to determine the merits notwithstanding the suits were brought against inferior or subordinate officials without joining the superior. We do not stop to inquire whether all or any of them can be differentiated from the case now under consideration, since in none of them was the point here at issue suggested or decided. The most that can be said is that the point was in the cases if anyone had seen fit to raise it. Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."

Chief Justice Schroeder in the last *Shutts* opinion for which Phillips is asking cert. and mandamus, pointed out that the issue of 6% versus 7% or higher has not been determined by the Texas Supreme Court. He said:

> "No Texas court ever mentioned the higher rates set by federal regulations to which Phillips had agreed to comply in its corporate undertaking. See *Phillips Petroleum Co. v. Adams,* 513 F.2d 355 (5th Cir. 1975),

cert. denied, 423 U.S. 930 (1979); *Phillips Petroleum Co. v. Hazelwood*, 409 F. Supp. 1193; *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480, 488 (Texas, 1978). This issue has not been determined by the Texas Supreme Court." (Appendix to Phillips' Brief, Kansas Supreme Court Opinion, 20a).

Surely, there can be no constitutional question involved in the Kansas Courts' applying the FERC rate, the equitable rate, rather than the statutory rate, when the issue of statutory rate versus equitable rate was not decided in the *Stahl* case.

CONCLUSIONS

The U. S. Supreme Court reversed and remanded and ordered the Kansas Courts thoroughly to consider the statutes and case law of the other states involved pertaining to interest. They have done so.

They find that the statutory rates, some of them enacted in the 1930's, would not be fair and equitable, but that the bank prime rate during the periods in question, the FERC rate, would be fair and equitable.

The opinions do not touch upon "federal common law" now alleged by Phillips to be an issue because it was not and is not an issue. The application by the Kansas Courts of FERC interest rate, the rate applied by Federal regulation to this same money if it were refunded to gas purchasers, is not creating federal common law.

Petition for Mandamus should be denied.

Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondents

(Received July 2, 1987)

PHILLIPS PETROLEUM COMPANY
Bartlesville, Oklahoma 74004 918 661-6600
Legal

16 June 1987
AIRBORNE

Mr. W. Luke Chapin
Chapin & Penny
124 East Kansas
Medicine Lodge, KS 67104

Re: Shutts II

Dear Luke:

Reference is again made to your pending Motion to Require Phillips to Account for Judgment. I am at last able to give your some definitive figures with regard to what the judgment against Phillips will be—as of 31 December 1987—if the United States Supreme Court does not grant Phillips' appeal in the fall of this year when the Justices return from vacation.

The computed liability, set out by state is as shown here and in the attached detail sheets:

• Arkansas	$ 2,252.20
• Kansas	1,012.42
• Louisiana	401,599.66
• Mississippi	167.53
• New Mexico	88,245.48
• Oklahoma	155,540.67
• Texas	1,472,936.19
• Utah	76.65
• West Virginia	3,904.87
• Wyoming	240,691.38
Total Interest	$2,366,427.05

This is a definitive number as to the interest liability, but it is not all that will be owed.

Total Interest	$2,366,427.05
Unpaid Royalty	130,578.81
Total Judgment	$2,497,005.86

In doing the roll-back audits necessary to generate the interest numbers, we found that some of additional royalty, the "principal," was never paid. Some $113,682.33 went into suspense accounts—dont's ask me why, and another $16,896.48 never got paid because of simple accounting errors. We figured the interest as though the unpaid royalty was paid and the total above includes interest on the unpaid royalty. We plan to pay the unpaid principal to the rightful owners when the interest is paid. As yet, I do not have the detail sheets to show me how the additional $130,578.81 is split out on a state by state basis, and I don't think that I can get it anytime soon. But, when the unpaid principal is added to the interest set out above, the grand total is $2,497,005.86.

This final total is less than shown in my letter dated on 16 June. The difference is accounted for by the fact that the earlier number did not have all of the indemnity money taken out of the equation. There was some indemnity agreement money paid out after the accruals bagan and we had to run the program first with that money still in before we could exclude for the periods after the various indemnity agreement were each signed. Anyway, pulling out the indemnity money dropped the total about $350,000.00 from the rought figure of about $2.85 million that I mentioned in my 16 June letter.

For the purpose of filing the supersedeas bond that you have indicated that you want, I suggest that we agree

on a bond in the amount of an even $2.5 million. This will cover the estimated total that would be due at the year's end.

I presume that the attached form of a Supercedeas Bond will be satisfactory to you.

Very truly yours,

/s/ Tom
T. L. Cubbage II
(918) 661-7026

TLC/tlc - RC

encl: (as)

cc: John L. Williford
Joseph Kennedy
Judge Keaton G. Duckworth
District Court
Seward County
Liberal, KS 67901

(Received April 4, 1983)

PHILLIPS PETROLEUM COMPANY
Bartlesville, Oklahoma 74004 918 661-6600
Legal

March 31, 1983

Mr. W. Luke Chapin
Chapin, Penny & Goering
P. O. Box 148
Medicine Lodge, KS 67104

Mr. Gerald Sawatzky
Foulston, Siefkin, Powers
& Eberhardt
700 Fourth Financial Center
Wichita, Kansas 67202

Mr. Ed Moore
Ginder & Moore
202 S. Grand
Cherokee, Oklahoma 73728

Mr. William C. Phelps
Sun Gas Company
Three North Park East
Dallas, Texas 75221

Re: Richard Wortman et al. v. Sun Oil Company, No. 79C40, District Court, Barber County, Kansas

Gentlemen:

Several Notices of Class Action Suit have been received by Phillips Petroleum Company, having been mailed to the company in care of P. O. Box 84616 in Dallas, Texas.

Please send all further communications to Phillips Petroleum Company in regard to the captioned case to the undersigned who is acting as counsel for the company in regard to this litigation.

This is *not* a request for exclusion.

Very truly yours,

/s/ T. L. Cubbage
T. L. Cubbage II
Office of General Counsel - Legal
Phillips Petroleum Company
1256 Adams Building
Bartlesville, Oklahoma 74004

TLC/ej

Encl. (as)

cc: Clerk of the District Court
Barber County, Kansas
Medicine Lodge, Kansas 67104